Nissan Motor Co Ltd v Teck Guan Automobile Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S02–460 OF 1999
ABDUL HAMID MOHAMAD, MOHD SAARI AND KC VOHRAH JJCA
4 JULY 2002

Civil Procedure *— Service — Out of jurisdiction — Whether there was justification in the granting of leave to serve the writ out of jurisdiction*

Civil Procedure *— Writ of summons — Renewal — Whether there was justification in the granting of the extensions*

The suit by the respondent against the appellant was for alleged breach of contract. In the court below, the respondent obtained an ex parte order for leave to serve its writ out of jurisdiction and also obtained an ex parte order for seven renewals of the writ. The learned deputy registrar dismissed an application to set aside the orders. On appeal to the judge in chambers, the learned judge dismissed the appeal and affirmed the decision of the learned deputy registrar, hence this appeal. The appellant raised two issues: (i) whether there was justification in the granting of leave to serve the writ out of jurisdiction; and (ii) whether there was justification in the granting of the extensions.

Held, dismissing the appeal:

(1) The complaint of the appellant was that in an application for leave to serve the writ out of jurisdiction, the respondent had failed to state clearly under which para of O 11 r 1 of the Rules of the High Court 1980 ('the RHC') the respondent was relying on. The learned judge of the court below said, '... the contents of the affidavit together with the statement of claim would in my opinion sufficiently show that the application was made under para (f) or (g) of O 11 r 1(1) ...'. The Court of Appeal would agree with this finding (see pp 3H–I, 4B–C); *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 followed.

(2) From a reading of O 11 r 4(1) of the RHC, there was no requirement in law that the relevant letters in support of the application for extensions had to be exhibited. All that was needed was for the information to be provided as was required under Form 12 (see p 4F–G); *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami, Iran* [1993] 4 All ER 456 followed.

(3) In applying the principle as enunciated in *Wadden v Whitecroft-Scovill Ltd* [1998] 1 All ER 996 to the facts of the instant case, the Court of Appeal would agree with the court below that having regard to all circumstances of the case, the respondent had

furnished good reasons which justified the court in granting the extensions (see p 6D). A

[Bahasa Malaysia summary

Guaman oleh responden terhadap perayu adalah untuk keingkaran kontrak. Dalam mahkamah di bawah, responden telah mendapatkan satu perintah ex parte untuk kebenaran bagi menyampaikan writnya di luar bidangkuasa dan juga untuk mendapatkan perintah ex parte untuk tujuh pembaharuan writ. Timbalan pendaftar yang bijaksana telah menolak satu permohonan untuk mengenepikan perintah-perintah tersebut. Atas rayuan kepada hakim dalam kamar, hakim yang bijaksana telah menolak rayuan tersebut dan mengesahkan keputusan timbalan pendaftar yang bijaksana, yang telah menyebabkan rayuan ini. Perayu telah membangkitkan dua isu: (i) sama ada terdapatnya justifikasi di dalam pemberian kebenaran untuk menyampaikan writ di luar bidangkuasa; dan (ii) sama ada terdapatnya justifikasi dalam memberikan perlanjutan-perlanjutan tersebut. B C D

Diputuskan, menolak rayuan tersebut:

(1) Aduan perayu adalah bahawa di dalam satu permohonan untuk kebenaran bagi menyampaikan writ di luar bidangkuasa, responden telah gagal untuk menyatakan dengan jelasnya di bawah perengan yang mana dari A 11 k 1 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') yang responden telah bergantung. Hakim mahkamah di bawah yang bijaksana telah menyatakan, '... kandungan afidavit bersama-sama dengan pernyataan tuntutan akan menurut pendapat saya dengan secukupnya menunjukkan bahawa permohonan tersebut telah dibuat di bawah perenggan (f) atau (g) dari A 11 k 1(1) ...'. Mahkamah Rayuan bersetuju dengan penemuan ini (lihat ms 3H–I, 4B–C; *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 diikut. E F G

(2) Daripada pembacaan A 11 k 4(1) KMT, tidak terdapat syarat di sisi undang-undang bahawa surat-surat yang berkenaan yang menyokong permohonan untuk perlanjutan haruslah diekshibitkan. Apa yang diperlukan adalah untuk maklumat itu diperuntukkan sepertimana yang diperlukan di bawah Borang 12 (lihat ms 4F–G); *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami, Iran* [1993] 4 All ER 456 diikut. H

(3) Dalam memakai prinsip sepertimana yang disebut di dalam *Wadden v Whitecroft-Scovill Ltd* [1998] 1 All ER 996 kepada fakta-fakta kes, Mahkamah Rayuan bersetuju dengan mahkamah bawahan bahawa dalam mengambilkira semua keadaan kes, responden telah memberikan alasan-alasan baik yang mewajarkan I

A mahkamah memberikan perlanjutan-perlanjutan tersebut (lihat ms 6D).]

Notes

For cases on renewal of writ, see 2 *Mallal's Digest* (4th Ed, 2001 B Reissue) paras 6603–6617.

For cases on service outside jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5270–5297.

Cases referred to

C *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (refd)

Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami, Iran [1993] 4 All ER 456 (folld)

Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd [1992] 2 MLJ 146

Wadden v Whitecroft-Scovill Ltd [1998] 1 All ER 996 (folld)

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Legislation referred to

Rules of the High Court 1980 O 11 rr 1, 4(1)

Appeal from: Civil Action No K243 of 1989 (High Court, Kota E Kinabalu)

Porres Royan (*Connie Willie* with him) (*Skinner Lind Willie Wong & Chin*) for the appellant.

Marina Tiu (*Yap Chin & Tiu*) for the respondent.

F **Mohd Saari JCA** (delivering judgment of the court): The suit by the respondent ('the plaintiff') against the appellant ('the defendant') is for alleged breach of contract.

In the court below, the respondent obtained an ex parte order for leave to serve its writ out of jurisdiction and also obtained an ex parte order for seven renewals of the writ. The learned deputy registrar dismissed an G application to set aside the orders. On appeal to the judge in chambers, the learned judge dismissed the appeal and affirmed the decision of the learned deputy registrar, hence this appeal.

In this appeal, issues raised by the appellant are as follows:

(i) whether there is justification in the granting of leave to serve the writ H out of jurisdiction; and

(ii) whether there is justification in the granting of the extensions.

On the first issue

The complaint of the appellant is that in the application for leave to serve I the writ out of jurisdiction, the respondent had failed to state clearly under which para of O 11 r 1 of the Rules of the High Court 1980 ('the RHC') was the respondent relying on. In the Supreme Court case of *Sunkyong*

International Inc v Malaysian Rubber Development Corporation Bhd [1992] 2 MLJ 146, Peh Swee Chin SCJ (as he then was) at p 150 observed:

> While it is always far better to quote section and verse or specific order or rule in any application, it is never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule.

On this issue, the learned judge of the court below said:

> It is true that the plaintiff in their ex parte application for leave to serve out of the jurisdiction merely indicated that the application was made under O 11 r 1(1) and failed to state in their affidavit in support the relevant paragraphs of the said rules on which they relied. However, the contents of the affidavit together with the statement of claim would in my opinion sufficiently show that the application was made under para (f) or (g) of O 11 r 1(1) of the Rules of High Court 1980. In view of this, I do not think that the order for leave obtained in the present case ought to be set aside on this ground.

We agree.

Turning to another aspect of the case, the complaint of the defendant was that the plaintiff had failed to exhibit the relevant letters in support of the plaintiff's application for extensions. In this regard, it is pertinent to refer to O 11 r 4(1) of the RHC which reads:

> An application for the grant of leave under O 3 r 1 or 2 must be supported by an affidavit in Form 12 stating the grounds on which the application is made and that in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably my be found.

In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami, Iran* [1993] 4 All ER 456 at p 463, Lord Goff observed:

> ... if in support of the plaintiff's ex parte application, an affidavit is sworn in proper form deposing facts which, if proved, provide a sufficient foundation for the alleged cause of action, that should generally be enough for present purposes.

From the reading of O 11 r 4(1) of the RHC and the above passage by Lord Goff, it is observed that there is no requirement in law that the alleged letters must be exhibited. All that is needed is for the plaintiff to provide the information as is required under Form 12. In his judgment, the learned judge concludes:

> I would respectfully agree with counsel for the plaintiffs that in the present case, the plaintiffs by the affidavit of their former solicitor, Raymond Szetu, has complied with Form 12. There was, therefore, in my view, sufficient evidence for the court to exercise its discretion under O 11.

We agree.

On the second issue

On this issue, the respondent referred to a series of incidents which contributed towards the delay in effecting the service of the writ on appellant. The incidents are as set out below:

(1) although the writ was issued on 28 October 1989, the application for leave to issue a concurrent writ and leave to serve out of jurisdiction was only granted on 16 March 1990;

(2) that the plaintiffs were only informed of the order dated 16 March 1990 on 20 June 1990;

(3) that the plaintiffs changed their solicitors and the brief was only settled in August 1990 (see the affidavit on Chin Hon Chong sworn on 12 September 1990);

(4) that Mr Chin Hon Chong of Messrs Yap Chin & Tiu at that time wrote for translation. That by September 1990, the translation had not been completed;

(5) that the request for service was made on 23 August 1990. There is nothing sinister or suspicious as the request could always be made first before translation;

(6) that the deputy registrar sent the notice of concurrent writ to Wisma Putra on 2 October 1990. No response was received from them;

(7) that Messrs Yap Chin & Tiu send reminders but to no avail (see pp 104–110 of the summons in chambers);

(8) that due to the non-response from Wisma Putra, Messrs Yap Chin & Tiu took the trouble to enquire from a legal firm in Japan about the status of the service (see pp 111–121);

(9) that the Japanese law firm advised that the Japanese Government requires certain conditions to be met, in particular a guarantee from the Malaysian Government as well as an agreement for reciprocity;

(10) that Messrs Yap Chin & Tiu immediately informed the honourable court of the requirement (see p 131 of the summons in chambers) and requested Wisma Putra to assist in complying with the requirement of the Japanese Government;

(11) unfortunately no response was received from Wisma Putra until September 1992 when they informed that service could not be effected as certain conditions had to be fulfilled. The matter had been referred to the Attorney-General's Chambers.

(12) only on 16 May 1994 was the copy of the Law for Judicial Assistance to Foreign Courts (see p 153) extended to Messrs Yap Chin & Tiu; and

(13) on 26 May 1994 the court informed Messrs Yap Chin & Tiu that as the condition of the Law or Judicial Assistance to Foreign Courts had not been met, service has not yet been effected (see p 166 of the summons in chambers).

In his judgment, the learned judge observed that the aforesaid incidents were compounded by our consular authority misplacing the documents which had to be replaced with a new set of documents. Further, the consular authority appeared to have made a mistake in requesting the Ministry of Foreign Affairs of Japan to effect service, which act led to all sorts of conditions being imposed.

On the delay in effecting service of the writ, the Court below concluded that it was mainly caused by circumstances beyond the control of the respondent.

In *Wadden v Whitecroft-Scovill Ltd* [1998] 1 All ER 996 at p 1000, Lord Brandon observed:

> In the *Kleinwort Benson*'s case, the House, after reviewing a long line of authorities on the present Rules of the Supreme Court, O 6 r 8 and its predecessor, laid down the following principles as applicable to the exercise of the court's discretion on an application for extension of the validity of a writ in cases where questions of limitation of action are involved: (i) on the true construction of O 6 r 8, the power to extend the validity of a writ should only be exercised for good reason; (ii) the question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason but it is not the on matter which is capable of doing so; (iii) the balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion; and (iv) the discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well established.

In applying the principle as enunciated above to the facts of the instant case, we agree with the court below that having regard to all circumstances of the case, the respondent had furnished good reasons which justified the court in granting the extensions.

On the question of non-disclosure of the expiry of the limitation period when applying for leave to serve out of jurisdiction, the respondent in fact disclosed that the limitation period would expire on 30 October 1989. Such information was, therefore, on record. What the respondent failed to do was to repeat the information in the supporting affidavits when applying for extensions. On this aspect of the case, the learned judge in the court below observed that the omission here was not sufficiently crucial or grave as to warrant the setting aside of the orders for extensions. We agree.

Based on the grounds as set out above, we do not think the appellant had any merit in this appeal which justified this court in disturbing the finding of the learned judge in the court below. In this regard, we wish to echo the statement by the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 at p 229:

> The principles upon which a court will act in reviewing the discretion exercise by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* [1942] AC 130 per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473). Upon question of procedure the Board is slow to interfere with the discretion exercised by a lower court (*Mayor of Montreal v Brown & Anor* (1876) 2 App Cases 168).

In the premise, we dismissed the appeal with costs here and below and we affirmed the decision of the learned judge. Deposit was ordered to the respondent for the account of costs to be taxed.

A My learned brothers, Abdul Hamid Mohamad JCA and KC Vohrah JCA, have read this judgment in draft and they have expressed their agreement with it.

Appeal dismissed.

B Reported by Peter Ling

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